Filed 4/15/19 P. v. Franklin CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT FRANKLIN, Defendant and Appellant.	D074162 (Super. Ct. No. SCN383494)

APPEAL from a judgment of the Superior Court of San Diego County, Michael D. Washington, Judge. Reversed.

Lindsey M. Ball, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Robert Franklin guilty of one count of receiving stolen property with a value exceeding $950 (Pen. Code, § 496, subd. (a))[1], and Franklin pled guilty to one count of possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and one count of possessing narcotics paraphernalia (*id*., § 11364). After reducing the conviction for receiving stolen property to a misdemeanor, the trial court sentenced Franklin to a total term of two and a half years on the three counts.

Franklin contends that the trial court erred because, with respect to the crime of receiving stolen property, it did not sua sponte instruct the jury on the elements of theft so that the jury could determine whether the property that Franklin received was stolen with the intent to permanently deprive the owner of the property.

We conclude that the trial court prejudicially erred in failing to sua sponte instruct on the elements of theft by larceny, and we accordingly reverse the judgment.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On the morning of February 25, 2018 a portable automated external defibrillator unit (AED device) was taken from a publicly accessible hallway in a Carlsbad shopping mall. The mall's AED device is available for public use in an emergency, and has a value of approximately $1,700. Security camera footage showed a man, identified as Franklin by a witness at trial, entering the mall at approximately 9:30 a.m. and going into the

1 Unless otherwise indicated all further statutory references are to the Penal Code.

hallway where the AED device is located. Franklin exited the mall a few minutes later carrying a bag that appeared to contain the AED device.

Approximately two hours later, at 11:40 a.m., a mall security guard was in the mall's parking lot near a free-standing automotive repair business. The security guard saw Franklin emerge with a bicycle from the entrance to a ravine, which is known to be a location frequented by homeless people. After exiting the ravine, Franklin walked toward the security guard, who, when Franklin was two arm lengths away, saw a bag containing the AED device hanging on the handlebars of Franklin's bicycle. According to the security guard, he stated to Franklin, "That's my property" and asked Franklin to identify himself and give him the AED device. Franklin complied by identifying himself and giving the undamaged AED device to the security guard. According to the security guard, Franklin told him that he had taken the AED device from the mall, and was cooperative and not hostile when the security guard contacted him. However, the security guard also testified that Franklin became "verbally hostile" when the security guard told him that he had called the police. In addition, although the security guard testified at the preliminary hearing that Franklin denied having the mall's property when the security guard first confronted him, he could not remember at trial whether Franklin made that statement. When the police arrived, Franklin was arrested.[2]

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[2] In a search incident to arrest, a pair of bolt cutters, which can be used for criminal activity, were found in Franklin's backpack, in addition to methamphetamine and drug paraphernalia on Franklin's person.

In an amended information, Franklin was charged with receiving stolen property in an amount exceeding $950 (§ 496, subd. (a); count 1), possessing burglary tools (§ 466; count 2), possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 3), and possessing narcotics paraphernalia (*id*., § 11364; count 4). The information also alleged that Franklin had eight prison priors. (§§ 667.5, subd. (b), 668.)

Prior to trial, Franklin pled guilty to possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)) as alleged in count 3, and possessing narcotics paraphernalia (*id*., § 11364) as alleged in count 4, and the court made a true finding on the prison prior allegations.

The jury found Franklin guilty in count 1 of receiving stolen property in an amount exceeding $950 (§ 496, subd. (a)), and found Franklin not guilty in count 2 of possessing burglary tools (§ 466).

At sentencing, the trial court reduced Franklin's conviction for receiving stolen property to a misdemeanor. The trial court imposed a term of 364 days in local custody on count 1, and consecutive to that term, it imposed a term of 364 days on count 3 and 180 days on count 4, for a total term of two and a half years.

II.

DISCUSSION

Franklin's sole argument is that the trial court prejudicially erred because it did not adequately instruct on the crime of receiving stolen property. We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "Review of

the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

A. *The Trial Court Erred by Not Giving a Sua Sponte Instruction on the Elements of Theft by Larceny*

In relevant part, the jury was instructed regarding the elements of receiving stolen property using CALCRIM No. 1750:

> "To prove that the defendant is guilty of this crime, the People must prove that:
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> "1. The defendant received, concealed or withheld from its owner property that had been stolen;
>
> "AND
>
> "2. When the defendant received, concealed, or withheld the property, he knew that the property had been stolen.
>
> "Property is stolen if it was obtained by any type of theft, or by burglary or robbery. Theft includes obtaining property by larceny, embezzlement, false pretense, or trick."

As the parties acknowledge, because the AED device possessed by Franklin had been taken from the mall, the most relevant category of "stolen" property set forth in the instruction is property obtained through theft by larceny. However, the jury was not instructed on the elements of theft by larceny, or any of the other crimes by which property may be "stolen."

"The elements of theft by larceny are well settled: the offense is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away." (*People v. Davis* (1998) 19 Cal.4th 301, 305.) Further, "California

courts have long held that theft by larceny requires the intent to *permanently* deprive the owner of possession of the property." (*People v. Avery* (2002) 27 Cal.4th 49, 54.) The intent to permanently deprive another of the property is also satisfied by the intent to keep the property "for so extended a period as to deprive the owner of a major portion of its value or enjoyment." (*Id*. at p. 55.) Thus, the People did not prove that Franklin received stolen property unless the AED device was taken with the intent to permanently deprive the mall of the AED device, or at least to deprive the mall of the AED device for such an extended period of time that it lost its value.

The parties did not request an instruction on the elements of theft by larceny. However, "[t]he rules governing a trial court's obligation to give jury instructions without request by either party are well established. 'Even in the absence of a request, a trial court must instruct on general principles of law that are . . . necessary to the jury's understanding of the case.' . . . That obligation comes into play when a statutory term 'does not have a plain, unambiguous meaning,' has a 'particular and restricted meaning' . . . or has a technical meaning peculiar to the law or an area of law." (*People v. Roberge* (2003) 29 Cal.4th 979, 988, citations omitted.) Based on this principle, *People v. MacArthur* (2006) 142 Cal.App.4th 275 (*MacArthur*) held that in a prosecution for receiving stolen property when there is "an issue raised by the evidence" as to whether the property was taken through theft by larceny with the intent to permanently deprive the owner of possession, the trial court must give a sua sponte instruction on the elements of theft by larceny. (*Id*. at pp. 280-281.) In such a case, the sua sponte instruction is necessary to "provide . . . guidance to the jury for determining whether property had, in

fact, been stolen or obtained by theft." (*Id*. at p. 279.) Indeed, the bench notes to CALCRIM No. 1750 cite *MacArthur* and explain that "[i]f there are factual issues regarding whether the received stolen property was taken with the intent to permanently deprive the owner of possession, the court has a sua sponte duty to instruct on the complete definitions of theft." (Judicial Council of Cal., Crim. Jury Instns. (2018) Bench Notes to CALCRIM No. 1750, p. 1126.)

Franklin argues that a sua sponte instruction on the elements of theft by larceny was needed here because the circumstances do not necessarily "indicate the AED device was carried away with the requisite intent to commit a theft. Instead, it could very well have been used for its intended purpose—for the temporary provision of medical care." Franklin points out that, according to the evidence, the AED device was available for public use in an emergency, and Franklin took the AED device only for approximately two hours, when he was noticed by the security guard emerging from the ravine and walking with the AED device in the direction of the mall and toward the security guard. Further, according to the security guard, Franklin cooperated in giving him back the AED device, which was undamaged. Under these circumstances, Franklin contends that "even if there was some evidence that the property was stolen, there also remained [a] sufficient evidentiary basis to dispute this premise altogether." Franklin argues, "[t]he fact that he returned to the shopping center in possession of its own property could demonstrate for some jurors that [Franklin] did not have the intention of permanently depriving the owner of [the] emergency medical device."

We agree. Although neither the People nor Franklin attempted to introduce evidence on the issue of whether the AED device was taken with the intent to permanently deprive the mall of its possession, it was the People's burden to prove beyond a reasonable doubt that the AED was stolen property. (*In re Winship* (1970) 397 U.S. 358, 364 ["the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"]; *People v. Booker* (2011) 51 Cal.4th 141, 185 ["A defendant is presumed innocent until proven guilty, and the government has the burden to prove guilt, beyond a reasonable doubt, as to each element of each charged offense"]; § 1096.) Based on the evidence presented at trial, an issue was raised as to whether the People met their burden to prove beyond a reasonable doubt that the AED device was taken with the intent to permanently deprive the mall of its possession. Specifically, because the AED device is an item available to the public for use in a medical emergency, and because Franklin had possession of the AED device for only two hours when he was found emerging from the ravine into the mall's parking lot, it was not clear from the evidence whether Franklin intended to permanently deprive the mall of the AED device, such as by taking it in order to sell it, or whether he temporarily took the AED device into the ravine to use it for a medical emergency. Indeed, the security guard's testimony that Franklin walked toward him and admitted that he had taken the AED device from the mall could support an

inference that Franklin was not interested in permanently keeping the AED device away from its owner as he did not attempt to hide it from the security guard.[3]

In sum, because "an issue raised by the evidence" was whether Franklin took the AED device with the intent to permanently deprive the owner of possession (*MacArthur*, *supra*, 142 Cal.App.4th at p. 280), the trial court was required to give a sua sponte instruction on the elements of theft by larceny.

B. *The Instructional Error Was Not Harmless Beyond a Reasonable Doubt*

The next issue we consider is whether the instructional error was prejudicial.

The parties disagree on whether we should apply the standard for assessing whether a federal constitutional error is prejudicial, as set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), or whether we should apply the standard for assessing state law error set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). As we will explain, we conclude that the *Chapman* standard applies, which requires us to determine whether an error is harmless beyond a reasonable doubt. (*Chapman*, at p. 24.)

As we have explained, as an element of the crime of receiving stolen property, the People were required to prove that the property was stolen. Here, the issue was whether the AED device was stolen in a theft by larceny, which requires an intent to permanently deprive the owner of possession. "An instruction that omits a required definition of or

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[3] We note that although Franklin did not testify at trial, he stated to the trial court at sentencing that he took the AED device to use it on a woman in the ravine who was suffering an overdose.

misdescribes an element of an offense is harmless only if 'it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ' " (*People v. Mayfield* (1997) 14 Cal.4th 668, 774; see also *People v. Flood* (1998) 18 Cal.4th 470, 502-503 ["an instructional error that improperly describes or omits an element of an offense, or that . . . directs a finding . . . upon a particular element" is a "trial error subject to *Chapman* review"].) Here, by failing to include a definition of the crime of theft by larceny when instructing on the crime of receiving stolen property when that instruction was required by the evidence, the trial court provided "[a]n instruction that omit[ted] a *required definition* of . . . an element of an offense" (*Mayfield*, at p. 774, italics added), namely that the property was *stolen*. Consistent with this analysis, the court in *MacArthur* applied the harmless error standard set forth in *Chapman* when assessing whether the trial court's failure to instruct on the elements of theft by larceny was a reversible error. (*MacArthur*, *supra*, 142 Cal.App.4th at p. 281 [citing *Chapman* and stating "[w]e cannot say beyond a reasonable doubt that the inadequate instructions did not contribute to defendant's conviction"].)

The People contend that the *Chapman* standard does not apply here because the instructional error merely related to " 'aspect of an element.' " To support their argument, the People rely on dicta in *People v. Larsen* (2012) 205 Cal.App.4th 810 (*Larsen*), which quoted from our Supreme Court's opinion in *People v. Cummings* (1993) 4 Cal.4th 1233, 1315 (*Cummings*). *Cummings* drew a "distinction . . . 'between instructional error that entirely precludes jury consideration of an element of an offense and that which affects only an aspect of an element.' " (*Larsen*, at p. 829, quoting *Cummings*, at p. 1315.)

However, the language quoted by *Larsen* from *Cummings* does not apply here because in *Cummings* our Supreme Court was distinguishing between the type of instructional error that is reversible *per se* (i.e., instructional error that entirely precludes jury consideration of an element of an offense) and instructional error that is subject to the *Chapman* standard of prejudice (error affects only an aspect of an element). (*Cummings*, at pp. 1311-1315.)[4] *Cummings*, and therefore *Larsen*, do not support the proposition that a trial court's misinstruction on an aspect of the element of an offense is subject to the *Watson* standard of prejudice instead of the *Chapman* standard.[5] Further, other case law makes clear that instructional error related to an *aspect* of an element is subject to the *Chapman* standard of prejudice. (*People v. Harris* (1994) 9 Cal.4th 407, 425 [stating that the *Chapman* standard applies "where the jury has been misinstructed on some aspect of an element of the charged offense"]; *People v. Johnson* (2015) 234 Cal.App.4th 1432, 1456 [applying the *Chapman* standard when "the jury was instructed only with the words of the statute, without an instruction on the definition of an element of the offense" in a prosecution for the crime of disorderly conduct based on the

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4 *Cummings* concluded that trial court's error in failing to instruct on four of the five elements of robbery was reversible *per se*. (*Cummings*, *supra*, 4 Cal.4th at p. 1312.) We note that our Supreme Court has since reconsidered and disapproved the holding in *Cummings* that certain types of instructional errors, not amounting to a total deprivation of jury trial, are reversible *per se*. (*People v. Merritt* (2017) 2 Cal.5th 819, 831 (*Merritt*).)

5 Although we do not read *Larsen* as suggesting that the *Watson* standard of prejudice applies to instructional error that affects only an aspect of an element of an offense, to the extent that *Larsen* may be read to so hold, we decline to follow it.

defendant's filming an "identifiable person" under or through clothing in violation of § 647, subd. (j)(2), when the term "identifiable person" was not defined for the jury].)

In applying the *Chapman* standard, an instructional error that omits or fails to adequately set forth an element of the offense may be found to be harmless "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." (*Neder v. U.S.* (1999) 527 U.S. 1, 17.) Under *Chapman*, "we may affirm despite the error if the jury that rendered the verdict at issue could not rationally have found the omitted element unproven; the error is harmless, that is, if the record contains no substantial evidence supporting a factual theory under which the elements submitted to the jury were proven but the omitted element was not." (*People v. Sakarias* (2000) 22 Cal.4th 596, 625.) " 'An instructional error . . . involving a single element, will be deemed harmless only in unusual circumstances, such as where [the] element was undisputed, the defense was not prevented from contesting . . . the omitted element[ ], and overwhelming evidence supports the omitted element.' " (*Merritt*, *supra*, 2 Cal.5th at p. 828.)

In the instant case, the evidence was far from overwhelming on the issue of whether the AED device was taken with the intent to permanently deprive the mall of its possession. As we have explained, the AED device is available to the public for use in a medical emergency, and Franklin had the AED device in his possession for only two hours when he emerged from the ravine, chose to walk *toward* a mall security guard instead of attempting to avoid him, admitted to the security guard that he had taken the

AED device from the mall, and then cooperated in giving the AED device to the security guard. Under those circumstances, overwhelming evidence does *not* support a finding that the AED device was taken with the intent to permanently deprive the mall of its possession. Although neither party focused at trial on the issue of whether the AED device was stolen, it was the People's burden to establish that element, and if properly instructed on the elements of theft by larceny the jury could reasonably have found that the People did not meet their burden. Therefore, we conclude that the instructional error was not harmless beyond a reasonable doubt.

DISPOSITION

The judgment of conviction in count 1 for receiving stolen property is reversed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.